Holt Plastering, Inc., and Miller and Associates Contractors, Inc., alter egos and a single employer and Joseph L. Holt and Barry P. Holt, Individuals *and* United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, AFL–CIO. Cases 17–CA–16417 and 17–CA–16524

May 17, 1995

SUPPLEMENTAL DECISION AND ORDER AND REMAND

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On January 27, 1994,[1] the National Labor Relations Board issued its Order in this case[2] adopting the attached decision of Administrative Law Judge William N. Cates directing Holt Plastering, Inc., and its alter ego, Miller and Associates Contractors, Inc., constituting a single employer, inter alia, to make payments to the Health and Welfare Fund, Pension Fund, and Industry Advancement and Education Fund required under the terms of a collective-bargaining agreement; to make whole the unit employees for losses incurred, if any, by virtue of the Respondent's failure to make the benefit fund payments; and to reimburse the Union for dues the Respondent failed to deduct and remit to the Union. On May 5 the United States Court of Appeals for the Eighth Circuit entered its judgment enforcing the Board's Order.[3]

On July 26 the Acting Regional Director for Region 17 issued a compliance specification and notice of hearing which set forth specifically and in detail the computations for the amounts due the benefit funds and the Union. For the first time in these proceedings, the compliance specification alleged that Joseph L. Holt and Barry P. Holt should be held individually liable to remedy the underlying unfair labor practices. Specifically, it alleged that, at all relevant times, Joseph L. Holt owned Respondent Holt Plastering, was its principal director, and exercised actual managerial and financial control and dominance over that corporation; and that Barry P. Holt owned Respondent Miller, was its principal stockholder, principal officer, and principal director, and with his father, Joseph L. Holt, exercised financial control and dominance over that corporation; and, based on a ''Confession of Judgment,'' the U.S. District Court for the Western District of Missouri, Western Division, has determined that Joseph L. Holt and Barry P. Holt are individually liable along with Holt Plastering and other related entities for certain fringe benefit contributions. It further alleged that Respondents Joseph L. Holt and Barry P. Holt constitute a single-integrated employer with Holt Plastering and Miller by virtue of their having failed to observe corporate formalities and intermingled their individual affairs with their corporate affairs. The compliance specification also apprised the Respondents that, pursuant to Section 102.56 of the Board's Rules and Regulations, if answers were not filed within 21 days from service, the allegations of the compliance specification would be deemed to be true. The Respondents failed to file an answer.

By letter of August 23 counsel for the General Counsel advised the Respondents that an answer to the compliance specification was past due, extended the date for filing an answer to August 30, and further advised that the General Counsel would file a Motion for Summary Judgment if an answer were not filed by that date. No answer was filed and, on September 9, the General Counsel filed with the Board in Washington, D.C., a motion to transfer proceeding and for summary judgment based on the Respondents' failure to file an answer to the compliance specification.

Subsequently, on September 14 the Board issued an order transferring proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On September 23 counsel for the Respondents filed with the Board a ''Notice to the National Labor Relations Board of Case Status,'' the purpose of which was to ''provide a closure statement on behalf of the corporate Respondents and to assert a special appearance on behalf of the individual Respondents, for the limited purpose of questioning the jurisdiction of the Board over them.'' That notice asserted that the corporate Respondents have ceased operations and liquidated the plant facilities, that they did not file an answer because of ''their non-viability and inability to comply with the Board's order,'' and that ''the corporate Respondents, by their inaction, have no objection to the relief requested.'' Regarding the individual Respondents, the notice of case status asserted that the Board does not have jurisdiction over the individual Respondents and that they did not and were not required to file answers ''because they were not party to any original proceedings, and more importantly, because of their inability to comply with the Board's Orders, even if they were made a part of the original proceedings.''

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations state:

[1] All dates are 1994 unless noted.

[2] Not included in Board volumes.

[3] The court's judgment was not published.

(b) *Contents of answer to specification*.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification*.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

Respondents Holt Plastering and Miller and Associates have failed to file a timely answer to the compliance specification. Moreover, the notice of case status filed on behalf of the Respondents in response to the Board's Notice to Show Cause is insufficiently particularized to constitute an answer pursuant to Section 102.56(b) of the Board's Rules, particularly in view of these Respondents' failure to explain their failure to answer the compliance specification.[4] See *DeVlieg-Sundstrand*, 306 NLRB 867 (1992). Accordingly, pursuant to Section 102.56(c) of the Board's Rules, we deem the allegations of the compliance specification against Respondents Holt Plastering, Inc. and Miller and Associates Contractors, Inc. to be admitted to be true, and we grant the General Counsel's Motion for Summary Judgment against Holt Plastering and Miller.

We deny the General Counsel's Motion for Summary Judgment on the issue of the personal liability of Joseph L. Holt and Barry P. Holt, however, and we remand this proceeding for a hearing on that issue. Although these two Respondents were properly alleged in the compliance specification to be individuals having personal responsibility for satisfying the remedy, they failed to file an answer.[5] Pursuant to Section 102.56(c) of the Board's Rules, we deem the allegations in the specification admitted. That does not settle the matter, however. The question is whether the allegations are sufficient, on their face, to meet the Board's strict standard for piercing the corporate veil to find personal liability. We find that they do not.

The Board has held that, in determining whether to pierce the corporate veil and find personal liability in the remedial context, an important consideration is the degree to which the individual made personal use of the assets of the corporation. *IMCO/International Measurement Co*., 304 NLRB 738 (1991). Thus, the Board will look beyond the organizational form where an individual or corporate employer has so integrated or intermingled assets and affairs that distinct corporate lines have not been maintained. *Riley Aeronautics Corp*., 178 NLRB 495, 501 (1969). Accordingly, the Board has pierced the corporate veil where there is detailed and specific evidence of personal use of corporate assets. See, e.g., *IMCO/International*, supra; *Honeycomb Plastics Corp*., 304 NLRB 570 (1991).

Here the allegations of the compliance specification are conclusory, alleging only that the individual Respondents have failed to observe corporate formalities with respect to the corporate Respondents and that they have intermingled their individual affairs with the corporate affairs of the corporate Respondents. These allegations do not set forth a sufficient factual basis to support a finding of personal liability.[6] *Omnitest In-*

[4] The assertion in the notice of case status that Holt Plastering and Miller and Associates are nonviable an dunable to comply with the Board's Order is misplaced, in any case. It is well settled that a respondent's inability to satisfy the claims set forth in a compliance specification is irrelevant. The issue in a compliance proceeding is the amount due, not whether the respondent is able to pay. See, e.g., *Pallazola Electric*, 312 NLRB 569 (1993); *Northern Homes*, 311 NLRB 1171 (1993). Further, Holt Plastering and Miller and Associates do not dispute that the recommended remedy is appropriate.

[5] Our colleague appears to argue that the Board has no ''in personam'' jurisdiction over the Holts because there is no showing that the compliance specification was served on them and because the affidavit of service is not signed. The General Counsel's Motion for Summary Judgment was served on them, however, and it asserts that the compliance specification was served on them. The Holts did not deny that assertion. In these circumstances, we concluded that there is no genuine issue as to service.

[6] The allegation in the compliance specification that, based on a ''Confession of Judgment,'' the United States District Court for the

spection Services, 313 NLRB 648 (1994). Accordingly, we will remand the allegations of the personal liability of Joseph L. Holt and Barry P. Holt to the Regional Director for hearing.

ORDER

It is ordered that the Respondent, Holt Plastering, Inc., and Miller and Associates Contractors, Inc. as alter egos and a single employer, Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall make whole the Fringe Benefit Funds and the Union by paying them the amounts detailed in the compliance specification, plus interest accrued to the date of payment.

IT IS FURTHER ORDERED that a hearing be held before an administrative law judge, to be designated by the chief administrative law judge, on the issue set forth above.

IT IS FURTHER ORDERED that this matter is remanded to the Regional Director for Region 17 for the purpose of arranging for the hearing and that the Regional Director is authorized to issue notice.

IT IS FURTHER ORDERED that upon the conclusion of the hearing the administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations; and that following the service of the decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, as amended, shall be applicable.

MEMBER BROWNING, concurring in part and dissenting in part.

I concur in my colleagues' decision to deny the Motion for Summary Judgment. I dissent, however, from their conclusion that the General Counsel's allegations are insufficient on their face to establish that the Holts are liable as individuals. I do not agree that those allegations are insufficient merely because they are conclusory.

I agree in general with my colleagues' statement of the standard that the Board applies to determine whether we should pierce the corporate veil and hold individuals liable for the unlawful acts of a corporation. As my colleagues state, under that standard, we will find individual liability if the individuals have so integrated their assets and affairs that distinct corporate lines have not been maintained.

It is elevating form over substance, however, to conclude, as do my colleagues, that the General Counsel has not alleged sufficient facts to show that the individuals have merged their individual affairs with the corporate affairs to a significant enough extent for us to find that we should pierce the corporate veil. The General Counsel has alleged, and, by not filing an answer, the individual Respondents have effectively admitted, that the individuals have merged their affairs with the corporations sufficiently for us to hold them individually liable. In my view, this should be the end of the inquiry on the issue of their personal liability.

I agree with my colleagues, however, that we cannot grant the General Counsel's Motion for Summary Judgment in this case. In order for us to hold that the individual Respondents have effectively admitted the allegations which establish their personal liability, we must first find that they have been served with the compliance specification which contains those allegations. There is nothing in the formal documents filed in connection with the General Counsel's motion which establishes that the compliance specification and notice of hearing was served on the individual Respondents.[1] I do not agree with my colleagues that the Respondents' failure to respond directly to the General Counsel's Motion for Summary Judgment or to specifically raise the issue of service operate as waivers. In their subsequent response (captioned notice of case status) to the Board's Notice to Show Cause, the Respondents asserted generally that the Board has not established jurisdiction over the individual Respondents. In my view, we have no jurisdiction to order relief against these individuals until the General Counsel has established service on them. Accordingly, I would conclude that the Respondents have sufficiently raised this issue in their response to the Notice to Show Cause.

For the foregoing reasons, I would deny the General Counsel's Motion for Summary Judgment and remand for a hearing, but only on the issue of whether the General Counsel has established that the individual Respondents, Joseph L. Holt and Barry P. Holt, were properly served with the compliance specification and notice of hearing.

Western District of Missouri has held Joseph L. Holt and Barry P. Holt individually liable for ''certain fringe benefits'' does not compel a different conclusion. There is no evidence before us that the district court made specific findings of fact regarding the matter in issue here. Thus, we cannot accord that district court action any controlling weight in this proceeding. Compare *Best Roofing Co.*, 311 NLRB 224 (1993).

[1] Although there is an affidavit of service in the formal papers which purports to prove service on the individuals, the affidavit is unsigned.

Steven Wamser, Esq., for the General Counsel.
Edward J. Essay Jr., Esq. (Edward J. Essay Jr. & Associates, P.C.), of Kansas City, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. In this case, counsel for the General Counsel (the General Counsel) claims that Holt Plastering, Inc. (Holt Plastering) and Miller and Associates Contractors, Inc. (Miller and Associates) (jointly the Company) have at all times material been alter

egos and a single employer within the meaning of the National Labor Relations Act (the Act). The General Counsel contends Holt Plastering entered into a contract stipulation agreement on or about April 26, 1991, which bound it to a collective-bargaining agreement between United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, AFL–CIO (the Union) and the Builders Association of Missouri (Association)[1] effective from August 20, 1990, through March 31, 1993 (1993 Association Agreement). The General Counsel alleges the Company has, since on or about May 1, 1992, failed and refused to continue in effect all the terms and conditions of the 1993 Association Agreement by ceasing to deduct supplementary dues pursuant to valid dues-checkoff authorizations executed by employees in the unit, failing to remit the supplementary dues to the Union, and by failing to make payments to the Health and Welfare Fund, Pension Fund, and Industry Advancement and Education Fund for its employees in the unit. The General Counsel also alleges that Miller and Associates withdrew recognition from the Union as the exclusive collective-bargaining representative of certain of its employees.

I heard this case in trial in Mission, Kansas, on August 23 and 24, 1993, based on an amended second consolidated complaint and notice of hearing (complaint) issued by the Regional Director for Region 17 of the National Labor Relations Board (the Board) on March 19, 1993, following his investigation of unfair labor practice charges filed by the Union in Case 17–CA–16417 on October 28, 1992,[2] and in Case 17–CA–16524 on January 12, 1993.

All parties were afforded full opportunity to call, examine and cross-examine witnesses and to present relevant evidence. I carefully observed the demeanor of the witnesses as they testified. I have considered the posttrial briefs filed by the General Counsel and the Company. Based on the above, and more particularly on the findings and reasonings set forth below, I will find the Company violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

At material times, Holt Plastering has been a corporation with an office and place of business located at Lee's Summit, Missouri, where it is engaged as a plastering and drywall contractor in the construction industry. During the 12-month period ending December 31, 1992, a representative period, Holt Plastering, in conducting its above-described business, purchased and received at its jobsites within the State of Missouri goods valued in excess of $50,000 directly from suppliers located outside the State of Missouri. The complaint alleges, the evidence establishes, the parties stipulated, and I find Holt Plastering is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Miller and Associates, at times material, has been, and is, a corporation with an office and place of business located at Lee's Summit, Missouri, where it is engaged as a contractor in the construction industry. In 1992, Miller and Associates performed remodeling work on a county government building (annex 3) in Cass County, Missouri. The contract between Cass County and Miller and Associates called for Miller and Associates to be paid $52,660.[3] Cass County, Missouri, had a 1992 budget of approximately $11 million dollars with approximately $340,230.01[4] of that budget coming from the Federal Government. Inasmuch as Miller and Associates performed services for Cass County, Missouri, in excess of $50,000 and inasmuch as the magnitude of Cass County, Missouri's operations would clearly warrant the Board's assertion of jurisdiction over it if it was not an exempt entity, I find Miller and Associates to be an employer within the meaning of Section 2(2), (6), and (7) of the Act. See, e.g., *Electrical Workers IBEW Local 46 (Pac Inc.)*, 273 NLRB 1357 (1985).

II. LABOR ORGANIZATION

The complaint alleges, the parties admit, the evidence establishes, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Holt Plastering was founded by Joseph Holt (President Holt) in December 1990 as a corporation performing subcontracting work in ''metal studs,'' ''drywall,'' ''fireproofing,'' ''acoustical ceilings,'' and ''exterior stucco.'' President Holt was the sole owner of Holt Plastering and at all times served as its one director, president, and secretary. From September 1990 until it ceased doing business, Holt Plastering's principal place of business was 1831 Southwest Market Street, Lee's Summit, Missouri. At its Market Street location, Holt Plastering had offices equipped with desks and related items as well as a ''fenced-in storage yard'' with various types of equipment stored therein. Some of the construction equipment stored at the facility and utilized by Holt Plastering was ''scaffold planking,'' ''aluminum walk boards,'' ''wheel barrels,'' ''plaster mixers,'' and ''a bobcat'' along with a number and variety of trucks. The trucks consisted of a 1985 2-ton flatbed Chevrolet, a 1981 (or possibly 1982) 1-ton fixed bed truck, a 1987 Chevrolet half-ton pickup truck, and a 1972 8-yard capacity Dodge dump truck as well as a low flatbed trailer. All of the vehicles were white in color and titled to Holt Plastering.

From September 1990 until June or July 1993, Holt Plastering made $500 monthly rental payments to Miller and Associates[5] for use of its part of the Market Street facility.[6]

[1] The Association is an organization composed of various employers engaged in the building and construction industry, which represents employer-members and other employers who stipulate to be bound to collective-bargaining agreements negotiated by the Association, in negotiating and administering collective-bargaining agreements with the Union.

[2] The Union amended this charge on November 27, 1992.

[3] Miller and Associates completed the project and was ultimately paid $58,198.79 by the county.

[4] This amount from the Federal Government represents crime reduction funds, Federal food reimbursement grants, and crime victim grants.

[5] According to President Holt, Holt Plastering ceased doing business in September 1992, but nonetheless continued to pay rent until July 1993. Holt Plastering and Miller and Associates had no written leasing agreement between them.

[6] The building was originally owned by President Holt's son and daughter-in-law, Barry (B. Holt) and Kimberly Holt. Miller and As-

Holt Plastering has insured the building from 1990 until the time of the trial herein. In addition to the positions held by President Holt, his sons held the positions of field supervisor (B. Holt) and estimator (Michael Holt, hereinafter M. Holt) for Holt Plastering. Diane Schifferdecker was an office employee for Holt Plastering handling ''payrolls,'' ''billings,'' and ''normal book work related to [Holt Plastering].'' Holt Plastering also employed ''a group of carpenters.''

Miller and Associates was incorporated in April 1990 by B. Holt and Doug Miller (D. Miller). B. Holt originally owned 25 to 30 percent of the stock in Miller and Associates with the remainder being owned by D. Miller. At the time of its incorporation, D. Miller was president and B. Holt was secretary.[7] Miller and Associates has always operated as a general contractor in the construction industry with its principal place of business located at 1831 Southwest Market Street, Lee's Summit, Missouri. In approximately May or June 1992, B. Holt purchased all of D. Miller's shares of stock in Miller and Associates and became the sole owner of Miller and Associates.[8] B. Holt, as sole owner of Miller and Associates, appointed his father to the position of president of Miller and Associates in either July or August 1992.[9] B. Holt's brother, M. Holt, began estimating cost and formulating bids for Miller and Associates around May 1992.[10] Approximately July or August, B. Holt appointed his brother, M. Holt, to the position of vice president with Miller and Associates. The ''1992 Annual Registration Report (Business)'' filed with the secretary of state for Missouri on December 17, 1992, and signed by President Holt reflects himself as president, M. Holt as vice president, and B. Holt as secretary/treasurer of Miller and Associates. The report also reflects President Holt to be the sole director of Miller and Associates.[11]

In approximately September 1992, Schifferdecker went to work for Miller and Associates handling payroll and other administrative/office related matters such as she had previously done at Holt Plastering. Scheduled pay periods and pay dates did not change when Schifferdecker went from Holt Plastering to Miller and Associates. The salaries that President Holt, B. Holt, and M. Holt drew did not change when they went from Holt Plastering's payroll to Miller and Associates' payroll. B. Holt and M. Holt continued to occupy their same offices at the Market Street address after they went from Holt Plastering to Miller and Associates; however, President Holt moved down the hallway to an office previously occupied by D. Miller. All vehicles and equipment of Holt Plastering were transferred to Miller and Associates.[12]

Holt Plastering's working carpenter/foreman, Jeffrey Postlewait, testified he ceased working for Holt Plastering[13] and commenced working for Miller and Associates as a foreman in the latter part of August 1992. J. Postlewait and his brother, Michael Postlewait,[14] were notified of the change in their employer during a meeting with President Holt and M. Holt in President Holt's office. According to the credited testimony of J. Postlewait, President Holt told he and his brother they were going nonunion and asked them to each sign a letter acknowledging such. After signing the requested letters, both J. Postlewait and his brother M. Postlewait immediately commenced working for Miller and Associates. J. Postlewait stated that as far as he knew, all employees that stayed on with Miller and Associates signed letters similar to the ones he and his brother signed. J. Postlewait testified that after he signed the letter and commenced working for Miller and Associates, he continued to work on the same project (Harold Holiday School) that he had been working on while employed by Holt Plastering.[15] J. Postlewait testified that his brother, as well as two or three other employees that had been on that project for Holt Plastering, continued to work thereon as Miller and Associates employees. According to J. Postlewait, M. Holt, and B. Holt continued to visit that worksite as they had done when it was a Holt Plastering worksite. J. Postlewait said he also worked at the annex building site at the Cass County Courthouse for Miller and Associates performing the same type work he had performed as an employee of Holt Plastering. J. Postlewait testified he worked for Miller and Associates on a Holt Plastering railroad depot job in Kansas City, Missouri, along with his brother M. Postlewait and other former Holt Plastering carpenters, John Regan, Jeff Thomas, Chuck Lillig, and Scot Newell.[16]

President Holt testified that as far as he knew, there were no carpenters working for Miller and Associates who had not previously worked for Holt Plastering. For the quarter ending September 30, 1992, Miller and Associates carried 29 per-

---

sociates executed a written lease agreement with B. Holt and Kimberly Holt, however, such was not produced at trial herein.

[7] According to B. Holt, Miller and Associates employed three individuals other than he and D. Miller during 1990–1991—one as a supervisor and two as general laborers/cleanup employees.

[8] Sometime in late 1992, Miller and Associates purchased the Market Street building from B. Holt and Kimberly Holt who were obtaining a divorce at or about that time.

[9] On July 31, 1992, Holt signed a State of Missouri ''Contribution and Wage Report'' as president of Miller and Associates.

[10] J. Holt testified M. Holt had been doing estimating work for Holt Plastering until Holt Plastering stop bidding for new work around the March to May 1992 timeframe.

[11] B. Holt suggested, during his testimony, the possibility of a ''typing error'' on this annual report explaining he should also have been listed as a director of Miller and Associates. B. Holt acknowledged, however, that a corrected or amended report was never filed with the State of Missouri on behalf of Miller and Associates. When asked by counsel for the General Counsel if President Holt was a director of Miller and Associates, he testified, ''I don't think so, no'' but acknowledged he signed the state filings referred to above.

[12] President Holt initially testified the transfer was by a purchase agreement between himself as a representative of Holt Plastering and B. Holt as a representative of Miller and Associates. President Holt later testified the transfer was by verbal agreement and constituted a gift. President Holt testified with respect to the transfer of vehicles and equipment that no appraisal as to the value of the transferred vehicles and equipment was made. B. Holt testified no money ever changed hands in the transfer from Holt Plastering to Miller and Associates and he added he is selling some of the equipment and giving the proceeds to his father, President Holt.

[13] J. Postlewait said he was hired at Holt Plastering by B. Holt in September 1991.

[14] M. Postlewait was also a carpenter employee of Holt Plastering.

[15] The Harold Holiday School project continued through October 1992.

[16] Thomas acknowledged doing carpenter work in August and September 1992 for Miller and Associates on a former Holt Plastering project but stated he and Lillig were hired as supervisors for Miller and Associates. Thomas also testified that Regan worked the last quarter of 1992 and the first quarter of 1993 as a carpenter for Miller and Associates.

sons on its payroll, 6 of whom had no earnings for that quarter. The record reflects that of the 23 persons having earnings during that quarter, 19 had previously been employed by Holt Plastering.[17]

Before addressing the issue of whether Miller and Associates is an alter ego of Holt Plastering, it is helpful to review certain well established Board principles. Those principles were clearly outlined by Administrative Law Judge Raymond E. Green in *RCR Sportswear*, 312 NLRB 513, 518 (1993), from which I quote:

> In *Advance Electric*, 268 NLRB 1001, 1002 (1984), the Board stated that the test for determining alter ego status was:
>
> > The legal principles to be applied in determining whether two factually separate employers are in fact alter egos are well settled. Although each case must turn on its own facts, we generally have found alter ego status where the two enterprises have ''substantially identical'' management, business purpose, operation, equipment, customers, and supervision as well as ownership. *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982). Accord: *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983). Other factors which must be considered in determining whether an alter ego status is present in a given case include ''whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead its purpose was to evade responsibilities under the Act.'' *Fugazy Continental Corp*., 265 NLRB 1301 (1982).
>
> In *MIS, Inc*., 289 NLRB 491 (1988), the Board, citing *Advance Electric* stated that; ''No one factor is determinative of alter ego status, and not all of these indicia need be present to find that an alter ego relationship exists.''

In *Gilroy Sheet Metal*, 280 NLRB 1075 at fn. 1 (1986), the Board noted that unlawful motivation is a factor frequently considered in determining whether alter ego status exists. See also *Best Roofing Co*., 298 NLRB 754, 757 (1990). The Board in *Gilroy* also noted two additional factors it considers important in addressing alter ego questions, namely, whether the alleged alter ego took over any unfinished work started by the other company and whether any shift in ownership was among ''close family members.'' In *Kenmore Contracting Co*., 289 NLRB 336 (1988), the Board addressed family ownership by noting ''a finding of common ownership may be made where, although the same individuals are not shown to be owners of each corporation, the corporations are solely owned by members of the same family.''

I am persuaded the evidence clearly establishes that Miller and Associates is the alter ego of Holt Plastering. First, Miller and Associates carried on the business of Holt Plastering in that it took over certain unfinished work that had been commenced by Holt Plastering. Second, Miller and Associates' management officials utilized the same offices they had utilized at Holt Plastering (with the exception that President Holt moved to a different office in the same building), drew the same salaries and utilized the same vehicles and much of the same equipment. As to the vehicles, I am persuaded President Holt was less than candid when he first stated the vehicles were transferred pursuant to an agreement between himself as a representative of Holt Plastering and B. Holt as a representative of Miller and Associates. He later characterized the transfer of vehicles[18] as a gift. B. Holt's testimony is also suspect when he suggests none of the equipment transferred was, or is, of any value to Miller and Associates.[19] All of the above tends to indicate the transactions (gifts or otherwise) were not arm's-length transactions between two distinctly separate corporations. Third, Holt Plastering continued to pay rent to Miller and Associates without a written agreement for months after it ceased doing business. These two companies are so interrelated that they are identical in my opinion. Further evidence of their alter ego status is established by the fact that President Holt served in that capacity, and as a director,[20] for both companies. While the exact ownership of two companies may not have been the same, it is clear both, at material times, were owned by close (father/son) family members. The vast majority of those employed by Miller and Associates were previously employed by Holt Plastering. In that regard, J. Postlewait credibly testified that he and other carpenters continued to perform the same type carpentry work for Miller and Associates that they had performed for Holt Plastering. Although a showing of unlawful motivation may not always be necessary, it may, as it does here, illuminate the true purpose behind the changes. President Holt revealed the true motivation when he told J. Postlewait in the presence of M. Postlewait that they were going nonunion and they could work for Miller and Associates if they signed letters acknowledging such. President Holt's attempts to cancel Holt Plastering's contract with the Union[21] tends to further indicate an effort to utilize Miller and Associates to avoid any contractual obligations with the Union on the Company's part.

In summary and for the reasons outlined above, I conclude and find Holt Plastering and Miller and Associates are alter egos and a single employer for the purposes of the Act.[22]

---

[17] The 19 in question were President Holt, M. Holt, B. Holt, Schifferdecker, Lillig, Thomas, Regan, J. Todd, Stork, Prudden, Ankrom, Gard, Jackson, Allen, Driskell, M. Todd, Lightfoot, Hayes, and Newell.

[18] I note the vehicles were transferred without an appraised value.

[19] B. Holt testified he is selling the equipment and giving the proceeds to his father, President Holt.

[20] I find unpersuasive B. Holt's explanation that it was a possible typographical error that he was not listed as a director for Miller. This is especially so when no effort was made to correct any such filing ''error'' with the State of Missouri.

[21] President Holt wrote the Union the following on September 16, 1992, ''Holt Plastering, Inc., hereby resigns and cancels its contract with your Union and any of its programs effective immediately as of this date, September 16, 1992.'' President Holt also wrote the Union a like letter on January 18, 1993.

[22] The Company makes too much of the fact that Miller and Associates was established well before the crucial events herein and was a general contractor rather than a subcontractor. It is of no legal moment that Miller and Associates may well have preexisted the critical times herein related to Holt Plastering. Furthermore, the facts weighing in favor of a finding of alter ego status are so overwhelming that the fact Miller and Associates business operations may have been somewhat different from Holt Plastering's is of no controlling consequence.

As alluded to elsewhere in this decision, the 1993 Association Agreement became binding on the Company herein when President Holt, on behalf of Holt Plastering, signed the ''Kansas City Contract Stipulation'' on April 26, 1991. Pursuant to the 1993 Association Agreement, the Company was required to make certain contributions on behalf of its employees performing work traditionally performed by carpenters (including foremen). The Company was required to make contributions to three fringe benefit programs, namely the ''Health and Welfare Fund,'' the ''Pension Fund,'' and the ''Industry Advancement and Education Fund'' (collectively the Benefit Funds). The record reflects Holt Plastering filed the required Carpenter Fringe Benefits Monthly Remittance Reports and made the required contributions on behalf of its carpenter employees from May 1991 to April 1992 inclusive.[23] Holt Plastering filed no reports and made no benefit contributions on behalf of any employees after April 1992. The Carpenter's fringe benefits monthly remittance reports for January through April 1992 reflect Holt Plastering made contributions for its carpenter employees including Mike Biondo, Mike Kirkendoll, Chuck Lillig, Jeff Postlewait, Roger Postlewait, John Regan, Jeff Thomas, Jerry Todd, Secundino Urquiza, and Ignacio Torrez. Holt Plastering continued to employ carpenters including those named above after May 1, 1992.[24]

Holt Plastering Carpenter Foreman J. Postlewait testified he learned from the Union in late July that Holt Plastering had failed to file the required reports or make the contractually called for fringe benefits contributions after the end of April. J. Postlewait testified he immediately thereafter went to President Holt's office and showed him the letter from the Union stating the contributions had not been made and asked, ''[W]hat the deal was.'' President Holt told J. Postlewait he did not know but would ''find out'' and ''take care of it.'' J. Postlewait testified that after approximately 2 weeks with no action, he spoke with M. Holt in M. Holt's office at which time M. Holt assured him ''the check had done been mailed.'' J. Postlewait stated that when nothing had happened by the latter part of August, he again spoke with President Holt in Holt's office. President Holt told him ''he would check in on it again'' that ''it should have been taken care of.'' J. Postlewait said he waited a little while longer then went to the Union for action and that it was at about this time that he (as noted elsewhere in this decision) went to work for Miller and Associates.

In *Jack Welsh Co*., 284 NLRB 378 (1987), the Board held that when during the term of an existing collective-bargaining agreement an employer ceases to make contractually required contributions to a union trust fund on behalf of its employees, it violates Section 8(a)(5) and (1) of the Act.[25]

Applying the above Board guidelines to the instant facts, it is clear the Company has violated Section 8(a)(5) and (1) of the Act and I so find. Holt Plastering by contract stipulation was bound by the terms of the 1993 Association Agreement and in accordance with that agreement Holt Plastering was required to make specific contributions to the Health and Welfare Fund, Pension Fund, and Industry Advancement and Education Fund, for its carpentry employees from May 1991 through March 31, 1993. Holt Plastering recognized its obligation and complied with the pertinent contractual provisions until the end of April 1992. After May 1, 1992, Holt Plastering unilaterally decided, at a time when it still employed carpenter employees, to forego, without the consent of the Union, its contractual obligations. It may not do so without violating the Act.[26]

The 1993 Association Agreement also required the Company to deduct union dues from those employees who so authorized and remit same to the Union.

Union Business Representative Larry Burton testified that among his duties were that of servicing the 1993 Association Agreement as it pertained to Holt Plastering. Business Representative Burton said he visited a Holt Plastering construction site in the fall of 1991 to secure dues authorization cards from Holt Plastering employees. Burton said that while doing so, he encountered President Holt. According to Burton, President Holt was ''aggravated'' because he was attempting to secure authorization signatures from Holt Plastering employees. Holt told Burton it was the members' place and ''only'' the members' place to pay their union dues. President Holt also told Business Representative Burton that ''it was too much trouble bookkeeping wise'' and ''he just wasn't going to do it [deduct and remit dues].'' On November 21, 1991, the Union ''faxed'' to Holt Plastering checkoff authorization cards for Chuck Lillig, Jeff Thomas, Jeff Postlewait, Roger Postlewait, and Thomas Kay. The Union secured approximately 10 additional dues deduction authorizations from Holt Plastering employees but there is no showing these additional cards were ever transmitted or presented to Holt Plastering.

It is undisputed that Holt Plastering never at any time deducted dues or remitted same to the Union.

It is a violation of Section 8(a)(5) and (1) of the Act for an employer to fail to abide by the provisions of its collective-bargaining agreement with its employees' representative including provisions calling for it to deduct union dues from its employees paychecks pursuant to valid dues-checkoff authorizations and remit same to the Union. See, e.g., *International Distribution Centers*, 281 NLRB 742, 743 (1986).

Counsel for the General Counsel may establish a violation in this type case if it is shown that the collective-bargaining agreement contained a dues-deduction clause and the employer failed to honor such where the employees had specifically signed dues authorizations. See, e.g., *Ogle Protection Service*, 183 NLRB 682, 683 (1970). The Board has held

[23] The Benefit Funds are administered by Zenith Administrators, Incorporated, a third party administrator employed by the Union for that purpose.

[24] Biondo worked through May 1992. Kirkendoll worked through May 5, 1992. Lillig worked 40-hour weeks for the greater part from May 1 through June 30, and worked less than 40 hours a week until August 11, 1992. Jeff Postlewait worked 40 hours per week from May to August, and worked at various times thereafter until September 15, 1992. Roger Postlewait worked somewhat regularly from May until September 15, 1992. John Regan, Secundino Uraquiza, and Ignacio Torrez worked approximately 40 hours per week from May to August 1992. Jeff Thomas and Jerry Todd worked somewhat regularly from May until August 1992.

[25] This is so even if the employer is engaged in the construction industry.

[26] The above finding of a violation of the Act is not barred by the 6-month limitations period spelled out in Sec. 10(b) of the Act. The charge in Case 11–CA–16417 was filed on October 28, 1992. Thus, the May 1, 1992 allegation is timely.

that the 6-month limitation period is tolled where the unlawful conduct is of a continuing nature. *Al Bryant, Inc.*, 260 NLRB 128 (1982). An employer's contractual obligation to deduct and remit union dues is a continuing one that absent a total repudiation of the collective-bargaining agreement renews itself each specific time the obligation arises. See, e.g., *A & L Underground*, 302 NLRB 467 (1991).

In the instant case, there is language in the 1993 Association Agreement, binding on the Company herein, calling for the deduction and remittance of union dues. The Union presented to the Company on November 21, 1991, signed authorizations from five employees, namely, Lillig, Thomas, J. Postlewait, R. Postlewait, and Kay. The Company never at any time deducted or remitted dues on behalf of its employees to the Union. The Union secured other dues authorizations from various employees, however, there is no showing that such authorizations were ever provided to the Company. It is, however, not necessary for the Union to have done so in order to prevail in this case. The Company, through President Holt, told Union Business Representative Burton in the fall of 1991, the Company was not going to deduct and remit dues on behalf of its employees. Thus, the Union was not required to engage in the futile act of presenting the additional authorization cards to the Company just to protect the rights of the employees it represented. At the time the Company refused to fulfill its contractual obligations regarding the deducting and remitting of dues, it was honoring other portions of its collective-bargaining agreement. Thus, with no total repudiation of the collective-bargaining agreement, the Company's failure to deduct and remit dues was a continuing violation. The Company, by failing to deduct and remit union dues in accordance with the parties' collective-bargaining agreement (and its employees' signed authorizations), violated Section 8(a)(5) and (1) of the Act on and after May 1, 1992, and I so find.

CONCLUSIONS OF LAW

1. Holt Plastering, Inc. and Miller and Associates Contractors, Inc. (jointly the Company) are in the construction industry and are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Holt Plastering, Inc. and Miller and Associates Contractors, Inc. are alter egos and a single employer.

4. All employees of the Company who perform work which has historically and traditionally been performed heretofore by members of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (to include work previously performed by Lathers) in the geographical area which extends to and includes the counties of Jackson, Clay, Platte, LaFayette, Ray, Carrol, Saline, Bates, Johnson, Cass, Harrison, Mercer, Grundee, Daviess, Caldwell, Livingstone, Henry, St. Clair, Hickory, Camden, Laclede, and Vernon in Missouri and Wyandotte, Johnson, Miami, Lynn, and Levenworth in Kansas, excluding all other employees, guards and supervisors as defined in the Act constitute an appropriate unit.

5. The Company is obligated to honor the 1993 Association Agreement.

6. By failing and refusing to honor the 1993 Association Agreement as described in paragraph 5 above, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

7. By, since or about May 1, 1992, failing and refusing to deduct and remit union dues to the Union pursuant to the 1993 Association Agreement and valid authorization cards, the Company violated Section 8(a)(5) and (1) of the Act.

8. By since on or about May 1, 1992, failing and refusing to make payments pursuant to the 1993 Association Agreement to the ''Health and Welfare Fund,'' ''Pension Fund,'' and ''Industry Advancement and Education Fund'' for its unit employees, the Company has violated Section 8(a)(5) and (1) of the Act.

9. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended the Company be ordered to make the payments as required by the 1993 Association Agreement to the various benefit funds from August 20, 1990, through March 31, 1993, to the extent such payments have not been made. Additional amounts, if any, due the employee benefit funds shall be paid as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). It is further recommended the Company be ordered to reimburse the unit employees for expenses, if any, ensuing from its unlawful failure to make the required benefit payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[27] It is further recommended that the Company be ordered to reimburse the Union for the dues which it failed to deduct and remit to the Union pursuant to the 1993 Association Agreement, limited, of course, to those employees who had signed dues-deduction authorizations. To insure against a windfall to the Union, this obligation is not applicable to employees, if any, who voluntarily paid dues to the Union during any or all of the pertinent period.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Holt Plastering, Inc. and Miller and Associates Contractors, Inc., alter egos and a single employer, Lee's Summit, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[27] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to make the payments to the ''Health and Welfare Fund,'' ''Pension Fund,'' and ''Industry Advancement and Education Fund,'' required by the 1993 Association Agreement.

(b) Failing and refusing to deduct and remit union dues to the Union as required by the 1993 Association Agreement for those employees who so authorized.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the payments to the ''Health and Welfare Fund,'' ''Pension Fund,'' and ''Industry Advancement and Education Fund,'' required under the terms of the 1993 Association Agreement.

(b) Make whole the unit employees for losses, if any, they may have suffered by the Company's failure to make the payments to the benefit funds required by the 1993 Association Agreement in the manner set forth in the remedy section of this decision. The appropriate unit is:

> All employees of the Company who perform work which has historically and traditionally been performed heretofore by members of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (to include work previously performed by Lathers) in the geographical area which extends to and includes the counties of Jackson, Clay, Platte, LaFayette, Ray, Carrol, Saline, Bates, Johnson, Cass, Harrison, Mercer, Grundee, Daviess, Caldwell, Livingstone, Henry, St. Clair, Hickory, Camden, Laclede, and Vernon in Missouri and Wyandotte, Johnson, Miami, Lynn, and Levenworth in Kansas, excluding all other employees, guards and supervisors as defined in the Act constitute an appropriate unit.

(c) Reimburse the Union for dues the Company failed to deduct and remit to the Union pursuant to the 1993 Association Agreement in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Lee's Summit, Missouri facility copies of the attached notice marked ''Appendix.''[29] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to honor the terms and conditions of the 1993 Association Agreement.

WE WILL NOT fail and refuse to deduct and remit union dues to the Union as required by the 1993 Association Agreement.

WE WILL NOT refuse to make the benefit fund payments required by the 1993 Association Agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit union dues to the Union as required by the 1993 Association Agreement.

WE WILL make the benefit fund payments required by the 1993 Association Agreement and WE WILL reimburse unit employees for expenses, if any, ensuing from our unlawful failure to make the required payments.

HOLT PLASTERING, INC., AND MILLER AND ASSOCIATES CONTRACTORS, INC., ALTER EGOS AND A SINGLE EMPLOYER